Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 125

DANIEL RED BIRD *et al.*, CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

Office Supreme Court U. S.
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No. 126

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 127

FRANCIS B. FITE, *et al.*, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

Brief on Behalf of Cherokee Citizens by Blood.

JOHN J. HEMPHILL,
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Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD *et al.*, CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE, *et al.*, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

STATEMENT, BRIEF AND ARGUMENT IN BEHALF OF THE CHEROKEES BY BLOOD.

Statement of Facts.

The Congress of the United States, through the instrumentality of the Commission to the five civilized tribes of Indians, commonly designated the Dawes Commission, under the supervision of the Secretary of the Interior, is subdividing the lands of the Cherokee Indians for the purpose of allotment of an equal share of said lands to the citizens of the tribe entitled to the same. For this purpose an enrollment is being made of all persons entitled by law to participate in the distribution of the lands of the Cherokee people. Between three and four thousand white persons, citizens of the United States and foreigners, who have intermarried with Cherokee citizens by blood, are claiming now that they are entitled to be enrolled for participation in the common property of the Cherokee people, and the right of such enrollment is earnestly denied on the part of the Cherokees by blood, and the Cherokee nation acting through its principal chief.

The question involved in this controversy was on February 24, 1903, referred by the Secretary of the Interior to the Court of Claims for its Findings and Opinion in accordance with Sec. 2, Act of March 3, 1883, (22 Stat. p. 485).

By Act of Congress March 3, 1905 (Rec. 36), the Court of Claims was authorized and empowered to render final judgment in the case, and the privilege was given to either party to appeal to this Court within thirty days from the filing of said judgment. On May 15, 1905, the Court of Claims filed its opinion in this case (R. p. 35), and May 18, 1905, filed the decree of the Court (R. p. 61), by which it was adjudged and decreed that the intermarried white persons residing in the Cherokee Nation who were married to Cherokees by blood prior to Novem-

ber 1, 1875, are entitled to share in the lands constituting the public domain of the nation and are entitled to be enrolled for that purpose, but that such intermarried persons acquired no rights in the funds belonging to the nation, except such as were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed by the United States by patent of December, 1838, and that all citizens who intermarried with Cherokees subsequent to November 1, 1875, acquired no rights in Cherokee property, are not entitled to participate in the distribution thereof, or to be enrolled for such purpose. On June 5, 1905, the Cherokee citizens by blood appealed to this Court from so much of the decree of the Court of Claims as adjudged that persons intermarrying with Cherokee citizens prior to November 1, 1875, were entitled to share in the Cherokee property and on June 7, 1905, the Cherokee Nation filed a similar appeal. On June 8, 1905, certain intermarried whites appealed from the decision of the Court of Claims, except that portion which held that the whites who intermarried prior to November 1, 1875, were entitled to share, and on June 15, 1905, other intermarried whites appealed from the judgment and decree of said Court without limitation. On June 20, 1905, these several appeals were allowed. (R. pp. 63, 64, 65, 66).

POINTS AND AUTHORITIES.

Cherokee lands and funds naturally belong to Cherokee people, and if white men set up a claim to either of these or to any part of them, it is incumbent upon the whites to show clearly the gift, grant, bargain or sale executed under proper authority by which the title to the property of the Cherokees or any part of it has passed out of them and into the whites.

We deny that any such transfer has been made or that the whites have any right whatsoever to any part of the Cherokee lands or funds.

In examining the claim of the intermarried whites now for the first time made, to be considered as members of the Cherokee Nation and enrolled as distributees of the Cherokee property, we must constantly keep in mind the unchanging policy of the Government of the United States, which from the beginning to the present day has endeavored to keep and maintain the Indians as a separate and distinct people, as also the policy of the Indians to keep themselves separate and distinct from the whites, all of which is shown, not only by the statutes of the United States and the Cherokee Nation, but by the practical fact that the Indians, who originally inhabited the eastern part of the United States, have been continually moved westward, even beyond the great Mississippi river, where it was supposed the white man would never disturb them.

In view of this unvarying policy of the two Governments, it is hardly possible to conceive of an Indian tribe like the Cherokees inviting the white man to become permanent members of the tribe, and incorporating them therein with all the rights and privileges of native Cherokees. No such right can be given as a mere matter of inference in the face of the well-defined plan of both nations. It must be declared in words which cannot be misunderstood in order to overcome this general policy and the presumption which necessarily arises from it. The claimants must produce something stronger than a simple Act of Council relating to intermarriage before they can lay claim to rights and privileges denied by the whole history of these two Governments.

Acts of Congress.

The several Acts of Congress establishing the Dawes Commission, and laying down the rules for its guidance, when taken as a whole, evince a well defined purpose upon the part of Congress to allot the Cherokee lands and divide their funds amongst the Cherokee Indians and those persons who by treaty stipulations had been embodied with the nation and accorded all the rights of native Cherokees.

The Act of Congress of March 3, 1893, creating the Dawes Commission requires the Commission to allot the lands amongst the "Indians." (27 Stats., p. 645, Sec. 16, March 3, 1893).

The Act of March 2, 1895, (28 Stat. p. 939), provides for continuing the work of the Dawes Commission, but does not in any way alter the law as to the allotment of lands to the Indians.

The Act of June 10, 1896, (25 Stat. p. 339), requires the Commission to respect all the laws, customs and treaties of the several tribes not inconsistent with the laws of the United States.

The Act of June 7, 1897, (30 Stat. p. 84), defines what was meant by the words "rolls of citizenship" in the previous Act, but does not change the general purpose of the Acts theretofore passed.

The Act approved June 28, 1898, Sec. 21, (30 Stat. p. 502) apparently makes decided changes in the previous enactments of Congress.

This statute may be construed in two ways, to wit: 1st. Keeping in view the object which Congress had, to wit: to allot the Cherokee property amongst the Cherokee citizens entitled to it by law. 2d. Literally, without regard to the purpose of this or the other Acts of Congress.

We contend that the Section is to be construed as a part

of a body or system of laws, keeping in view the manifest purpose of Congress to divide this property fairly and justly between the persons legally entitled to it, so that when the Act confirms this roll of 1880 and requires the enrollment of all persons whose names are found on said roll, it meant to confirm not only the names of the persons upon said roll, but the descriptive matter which under the Cherokee law was set opposite the name of each person enrolled, showing whether he or she was a citizen at all and if so, what kind of citizenship he enjoyed, thereby determining whether or no it was a citizenship which entitled the person to property rights or not. For it must be remembered that the Act of the Cherokee Council, under which the enrollment of 1880 was made required that the returns should show the names of all whites entitled by law to citizenship, all not so entitled, all colored persons entitled by law to citizenship, all not so entitled and all Indians not so entitled, together with many other things. (R. p. 59). That is a reasonable and just construction of the Act, and leads to no injustice. Evidently the purpose of Congress was to confirm the roll of 1880 only in so far as was proper to carry out the object of this and former acts of Congress relating to enrollment of Cherokee Citizens entitled to property rights.

Whatever may be said, however, as to that, it is clear that the intermarried whites can make no claim under Section 21 of the Act of 1898, for after confirming the roll of 1880, the same Section goes on to say that the Dawes Commission shall enroll certain designated persons "with such intermarried white persons as may be entitled to citizenship under Cherokee laws." It is evident from this that all whites intermarried are not to be enrolled, although they all enjoy a certain kind of citizenship when they intermarry a Cherokee citizen. The enrollment is confined

to *such* intermarried white persons as *may be entitled* to citizenship under Cherokee laws. What kind of citizenship? Evidently the citizenship which, according to Cherokee laws, meets the purposes of this Act of Congress, *i. e.*, the citizenship which entitles such persons, to participate in Cherokee property under Cherokee laws. This special provision of the Section relating to intermarried whites, under all rules of construction, takes them out from the general provision, confirming the roll of 1880, and specifically designates which class of intermarried citizens is to be enrolled.

If the Act be given a literal construction, it leads to the most absurd results.

The Section provides that in "making rolls of citizenship of the *several tribes*," the Commission shall take the roll of Cherokee citizens of 1880, (not including freedmen), as the only roll intended to be confirmed by this and previous Acts of Congress. It will be noted that this provision relates not solely to the Cherokees, but to the "rolls of citizenship of the *several tribes*," so that by this part of the Section, the Cherokee roll of 1880 is constituted the only one of all the rolls of any of the Five Civilized Tribes that was intended by Congress to be confirmed, either by this or by any preceding Act.

No reason is given why the other rolls of the various tribes should have been cast aside, and this single roll of 1880 made to do duty not only for the Cherokees, but for all the other tribes as well, not one of whose members appear upon said roll.

This Section 21 further directs the Commission to "enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll of persons whose names are found thereon." This embraces all descendants whether living or dead. It further embraces (1) all intermarried white persons who have used the inter-

course laws in the prosecution of a Cherokee Indian; (2) every intermarried white who being left a widower has married a person not of Cherokee blood, (3) intermarried whites who have abandoned their wives, notwithstanding that the Cherokee law expressly provides that all such persons shall forfeit all claim and right of citizenship.

The Section will thus be made to embrace the descendants of those who have forfeited their rights, even though such descendants have not a particle of Cherokee blood in them.

The Act of May 31, 1900, (31 Stat. p. 236), directed the Commission to continue to exercise the authority theretofore given them, but expressly limited their authority by the proviso that they should neither receive, consider or make record of any application of any person for enrollment as a member of any tribe who had not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such. This, of course, excluded all descendants of Cherokee Indians or other citizens, whose parents had been properly enrolled or who had been admitted to citizenship and recognized in that capacity.

When the time came to put these laws into execution, it was evidently discovered that they were so confused and uncertain that Congress in its next enactment upon the subject reiterated in express terms its original plan and purpose of respecting the laws, customs and treaties of the Cherokees, and enacted the laws of July 1, 1902, under which the enrollment is now finally being made.

By Sections 25 to 28, (32 Stat. p. 720), it is provided as follows, to wit:

"Sec. 25. The roll of the citizens of the Cherokee Nation shall be made as of September 1, 1902, and the names of the persons then living and *entitled to enrollment on that date* shall be placed on the roll."

Section 26 provides that the names of all persons living on September 1, 1902, "entitled to be enrolled as provided in Section 25 hereof shall be placed upon the roll." Section 28 forbids the enrollment of any person who has been enrolled as a citizen of any other tribe. Section 27 then proceeds to say that in all other respects the enrollment shall be made in accordance with Section 21 of the Acts of June 28, 1898, and May 31, 1900.

The result therefore is that before any applicant can be enrolled as a Cherokee under the terms of this last and controlling Act of Congress he must meet these several requirements, to wit:

1. He must be living September 1, 1902.

2. He must be entitled to enrollment on that date.

3. He must not have been enrolled in another tribe.

4. He must be a recognized citizen of the tribe and duly and lawfully enrolled or admitted as such. (Act of May 31, 1900).

He must meet not one, nor two, nor three of these requirements, but all of them.

Manifestly therefore an applicant might be a recognized citizen of the tribe and lawfully enrolled or admitted as such, but he could not be enrolled by the Dawes Commission for the participation in the property of the Cherokee people unless he was living September 1, 1902, had not been enrolled with another tribe and was "entitled to enrollment on that date."

The question then is "who is entitled to enrollment?" That is answered by examining the Cherokee laws and treaties to ascertain who was entitled to participate in the distribution of the lands and funds of the Cherokee people on September 1, 1902.

Such an examination will show that the only persons who are legally entitled to enrollment besides the native Cherokees are the Delawares and the Shawnees. The first derive their right and title under and by virtue of the treaty between the Delawares and the Cherokee Nation with the assent and approval of the United States under date of the 8th day of April, 1867, and the second derive their right and title under and by virtue of the treaty of the 9th day of June, 1869, between the Shawnees and the Cherokee Nation with the consent and approval of the United States.

To securely induct the Delawares into the full rights of native Cherokees the treaty of the 19th day of July, 1866, between the United States and the Cherokee Nation was entered into in solemn form providing for the location of friendly Indians upon the lands of the Cherokees. This was followed by regularly registering all the Delawares by name who desired to remove from Kansas to the Indian country, and at the same time the number of the Cherokees was taken; the value of the lands and funds of the Cherokees was estimated and the amount was determined that the Delawares would fairly and justly pay into the common fund of the Cherokees as purchase price of a per capita interest in the Cherokee lands and funds, and this amount was actually paid by the Delawares. All these things were fully set forth and agreed to in writing by the head men of the two nations with the assent and approval of the United States and the same was executed with all the formalities of a treaty.

Practically the same steps were taken with reference to the Shawnees when they became citizens of the Cherokee Nation.

In behalf of the white men no agreement, contract or treaty of any sort has ever been made. No account of their number has ever been taken. They have contributed nothing whatever to the common fund of the Cherokee Nation. Their claim is based upon an Act of the Cherokee Council permitting intermarriage between white persons and Cherokees in which they are spoken of as citizens by intermarriage.

If the Cherokee National Council was clothed with authority to admit citizens to the nation with the full rights of native Cherokees, what necessity was there for the expenditure of time, labor and means in preparing and executing the treaties under which the Delawares and Shawnees were admitted to the nation?

The restriction placed upon the power of the Council in reference to admission to citizenship in the first article of the Cherokee Constitution fully answers the above question. (Cherokee Constitution, Art. 1, Par. 2).

If the Delawares and Shawnees were required to pay in full for their property rights in the nation, on what principle of justice can it be expected that the whites shall receive what they never paid for? Curious to say, if the intermarried whites are successful in their effort to force themselves on the roll now being prepared for distribution of the Cherokee property, they will each take not only a full share of the original Cherokee property, but also their proportionate amount, according to numbers, of the very money the Delawares and Shawnees have paid into the common treasury for the purpose of securing what the intermarried whites will receive without paying anything.

As shown by the preamble to the Act relating to the intermarriage of whites, the purpose of the enactment was purely administrative, to subject the intermarried

whites to the control and dominion of the Cherokee laws.

The terms of the United States statutes were such that a white man, a citizen of the United States, could marry an Indian woman and live in the Indian country, and be responsible solely to the laws and authorities of the government of the United States, disregarding entirely the laws of the land in which he lived. To meet this condition and secure control over these white citizens, the Cherokees passed the laws relating to intermarriage of whites, and now to the astonishment of everyone, these same white men rise up and declare that the law which was passed solely for the purpose of controlling them, really contains a grant of lands and funds to them, greater in amount than that of either the Delawares or Shawnees. And while these two last classes paid for their shares, respectively, the white men paid nothing. Their share, they declare, is to be a gift pure and simple, and to be all clear gain. They are to have not only a share of the original Cherokee property but also a part of the sums paid by the Delawares and Shawnees.

When the treaty of 1867, between the Cherokees and Delawares was about to be executed, the membership of both nations was enumerated and their numbers set out officially. (193 U. S. 131). No proof has been offered and no pretense made that the white men were then counted amongst the Cherokees, although the amendments to the Constitution had then been made and the intermarriage laws for white men had been many years on the statute book. Neither were the whites counted when the treaty was made with the Shawnees. It was greatly to the interest of the Cherokees to make their numbers as large as possible but even this temptation did not lead them into supposing that the whites were to be counted as citizens entitled to any share in the common property.

Doubts have been expressed whether the amendments to the Cherokee Constitution of Dec. 7, 1866, were legally adopted. In no other part of the Constitution are white persons mentioned at all. Assuming for the present that these amendments are properly a part of the Constitution, we find that there are various classes of persons made citizens of the Cherokee Nation, each being admitted upon different conditions.

Section 5 of Article 3 of the amendments provides for four different conditions, under which persons may be taken and held to be citizens of the Cherokee Nation, to wit:

1st. Native born Cherokees.

2d. All Indians.

3d. Whites, "legally members of the nation by adoption."

4th. Freedmen.

This article of the Constitution simply declares who should at that time be taken and held to be citizens of the Cherokee Nation, and provides that the future citizenship shall consist of the descendants of one or the other of these four classes at that time declared to be citizens.

The condition therefore, under which any white man may be legally a citizen of the nation is not that he is intermarried with a Cherokee, or that the National Council has tried to adopt him into the nation by the passage of an Act to that effect, but he can be a citizen only on condition that he was on December 7, 1866, "legally a member of the nation by adoption," or is descended from one who was.

Which of the three departments into which the Cherokee government is divided by the Constitution—legislative, executive and judicial—has been granted by the Constitution the power of legally adopting new white citizens?

The only authority under the Constitution of the Cherokee Nation, referring to the admission of anyone to citizenship is the clause declaring that the National Council shall have power to *readmit* by law to "all the rights of citizenship" any person who has removed with his effects out of the limits of the nation, and who desires to return to the nation and memorializes the National Council for such readmission (Constitution, Art. I, Sec. 2).

It is manifest, therefore, "that all the rights of citizenship" cannot be granted by the National Council to any persons except former citizens, and then only upon the terms and conditions above set forth, and any effort to admit any other persons is illegal, and must be null and void. Whatever limited rights, therefore, the intermarried whites may have obtained by the fact of marrying a Cherokee woman are not "all the rights of citizenship."

The proper and just limit to the rights of an intermarried white man are well defined by the preamble to the Act regulating the intermarriage with a Cherokee woman, of October 15, 1855, which declares:

> "Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons who may from time to time be privileged to reside within the territorial limits of this nation, therefore, every white man * * * desiring to marry a Cherokee woman" * * *

The same purpose is declared in this identical language in every Act passed on the subject. (R. pp. 10, 15, 16, 20). Showing that the purpose of the Act was simply to secure jurisdiction over the intermarried whites and the National Council may have had authority to pass a law of this character for administrative purposes only.

These several Statutes passed for the express purpose of securing jurisdiction by the Cherokee government over the persons who may from time to time be privileged to reside within the territorial limits of the nation, were evidently enacted in pursuance of the authority granted by a treaty with the United States, which empowered the Cherokees to pass all laws necessary for the government of their own people, and "such persons as have connected themselves with them." (Treaty of 1835, Sec. 5).

An examination of the Cherokee law of 1855, relating to Intermarriage (R. 50) fails to show the slightest indication of purpose upon the part of the National Council to grant any property rights of any kind to intermarried whites. On the other hand the Act of December 5, 1874, which became effective November 1, 1875, does provide that the rights and privileges conferred thereby shall extend to a right of soil and interest in the vested funds of the nation only upon the payment of the sum of $500.

How can it be said that the Act of 1855, is of exactly the same purport and effect as the Act of December 5, 1874, when the latter expressly grants a right to the soil and vested funds of the nation, and the former does not even mention or allude to the subject?

On November 28, 1877, the National Council adopted an amendment striking from the law, all right of intermarrying whites to acquire any interest in the soil or vested funds, and left in full force that section of the Act expressly declaring that the rights and privileges therein conferred shall not extend to right of soil or interest in the vested funds of the nation and that has continued to be the law ever since. (R. 52). If the Cherokees, constituting one of the Five Civilized Nations of Indians, understand the use of language at all, it is asking the Court to go a long way in behalf of these intermarried whites to decree not-

withstanding this express and emphatic provision, that the whites intermarrying subsequent to November 1, 1875, did acquire right of soil and interest in the vested funds. It is safe to say that if any legislature in any State of the Union or the Congress had placed these words in a public Act, there is not a court in this country that would decree that the legislative body meant the very opposite of what it enacted and that in spite of the fact that certain rights are forbidden, they have nevertheless been conferred. It is upon such a condition of the Statute law of the Cherokee Nation that the alleged grant of property rights to the white man is based.

It must be equally clear that persons who married prior to December 5, 1874, acquired no rights of property because no grant is made to them by any Act, or by any treaty as required by Sec. 2116, U. S. Rev. Stats.

That there was a great difference between the classes of citizens, not only as to their mode of entrance into the nation, but as to the extent of their rights is manifest from reading the Acts of the Cherokee Council and the treaties made by the nation. The "Act for the Intermarriage of Whites and Foreigners" begins with the preamble above cited, which sets a limit to the purpose of the Act itself and of the rights granted thereby.

Intermarriage citizenship of the whites is restricted in various ways not applicable to other classes of citizens.

1. His rights of citizenship arise only out of marriage with a Cherokee by blood, and not by adoption; 2. He can't marry without a certificate of good moral character; 3. He must pay both to the clerk and to the nation for his certificate; 4. He must subscribe to a special oath; 5. The certificate of his marriage must be recorded; 6. He can't sign a certificate for another party, desiring to intermarry; 7. Using the intercourse laws, forfeits his rights as a citi-

zen; 8. Being a widower, if he marries a woman not a Cherokee by blood, his citizenship rights are forfeited; 9. If he abandons his wife, all the rights are forfeited. 10. By Act of Cherokee Council of Dec. 6, 1890, Cherokee Courts were empowered to declare the rights of a white man wholly forfeited. (R. 55.)

When the Cherokee Council undertook to admit intermarried whites not alone to citizenship but also to property rights in the nation, they provided by the new Code of Laws passed December 5, 1874, that every such intermarried white should pay into the treasury $500 "in which case he shall be deemed a Cherokee to all intents and be entitled to all the rights of other Cherokees." This is a very different thing from saying that an intermarried white shall be a "Cherokee citizen," which is all that any other Act of the Council relating to this subject undertook to do. This grant of Cherokee citizenship practically meant that such white persons were permitted to reside within the nation, be subject to its laws, but be free from the laws relating to intruders.

The privilege of paying $500 into the treasury of the Cherokees and becoming thereby entitled to all the rights of other Cherokees existed only from November 1, 1875, to November 28, 1877, *i. e.* only until a new election was held by the people, and immediately after this expression of the public will the law granting property rights to intermarried whites was repealed by the National Council and from that day until the present, the Statutes of the Cherokees have expressly declared that the rights of citizenship conferred by the Acts relating to intermarriage of whites, "shall not extend to right of soil or interest in the vested funds of the nation."

Whatever may or may not be the rights acquired by white men who intermarried with Cherokees by blood, there

can be no question that since the passage of the Act of the Cherokee Council of Nov. 28, 1877, no property rights have been acquired or could be acquired by intermarriage with a Cherokee citizen. No discussion can make it any clearer than the Act as amended does, that intermarriage between a white person and a Cherokee gives to the former no rights of property of any kind or character in the Cherokee lands or funds.

In the Act relating to the intermarriage of Cherokees with other Indians, not one of these restrictions are placed upon the rights of the Indian. The Act provides that the marriage shall be contracted according to the law regulating marriages between "our own citizens" and it is declared that such Indian "shall be and is hereby deemed a Cherokee to all intents and purposes and entitled to the rights of other Cherokees." (Comp. 1892, Sec. 670).

Whether the Act relating to intermarriage of other Indians is constitutional is extremely doubtful, but it serves one good purpose in showing by contrast the difference which the Cherokees intended to establish between the intermarried whites and the intermarried Indians. In the latter instance, they were to be "deemed Cherokees to all intents and purposes and entitled to the rights of other Cherokees." The Counsel has produced no such language from the Act relating to intermarried whites, and the Court will search in vain for that or any other expression of the same purport. It must be remembered also that whil the Statutes of the Cherokee Nation, and of the United States exclude in every way practicable the coming of the white man into the Cherokee Nation, that no such inhibition was placed upon the Indians of other tribes.

The Treaty of July 19, 1866, between the Cherokee Nation and the United States provides as to the former slaves that they shall be free and they "and their

descendants shall have all the rights of *native* Cherokees." Ariticle 15 of the same treaty, after providing for the settlement of friendly Indians amongst the Cherokees and the manner in which the latter shall be paid therefor, then stipulates "that they shall be incorporated into and thereafter remain a part of the Cherokee Nation on *equal terms* in every respect with *native Cherokees.*" When the Delawares were about to be moved into the Cherokee country as friendly Indians, it was stipulated in the agreement that "on the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become *members* of the Cherokee Nation, with the *same rights and immunities* and the same participation (and no other) in the national funds as *native Cherokees* * * * and the children thereafter born of such Delawares so incorporated into the Cherokee Nation shall *in all respects be regarded as native Cherokees.*" Two years later when an agreement was made with the Shawnees, after the amount of money to be paid was provided for the rights of Shawnees were defined as follows: "and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms *in every respect* and with all the privileges and immunities of native citizens of said nation."

We submit therefore, that the intermarriage of a white man with a Cherokee woman is in itself very far from giving to the intermarried whites the same rights and interests as if he had been born a member of the Cherokee Nation. This difference in citizenship is easily explained. First, the Cherokees were naturally suspicious and afraid of the whites, as is clearly manifested by the numerous precautions taken in the Act relating to the intermarriage of the whites; second, the white people paid nothing for their entrance as citizens of the nation, while the Shawnees and

Delawares paid a sum then ascertained to be a full per capita share of the value of the lands and funds belonging to the nation.

That the intermarried whites did not become citizens of the Cherokee Nation in the full sense in which foreigners become citizens of the United States when they become naturalized, is shown by the different form of oath taken under the laws of the Cherokees. (Laws of 1892, p. 331), and the oath of allegiance taken to the United States (Rev. Stat. p. 380, Sec. 2165). In the former, the party swears to honor, defend and submit to the Cherokee laws and Constitution, and declares that he will seek no protection from any government incompatible with the protection and privileges guaranteed to the Cherokee Nation by the United States in treaty stipulations; in the latter, the new citizen swears allegiance to the United States and abjures all allegiance to any foreign potentate on earth, and especially as to the country or king of which he was a citizen or subject.

The Acts of the Cherokee Council readmitting A. G. Greenway and his two children, and David N. Allen and his family, show clearly the distinction drawn by the National Council between an intermarried white citizen and those who are citizens by Cherokee blood. (R. p. 57).

Other Indian Treaties.

Each of the five civilized tribes made treaties with the United States in 1866, and the United States was represented by the same Commissioners in each case. In the treaty with the Chocktaws and Chickasaws, rights of property and citizenship were given to white persons by treaty with the full assent of the United States. In none of the other treaties with the other tribes were any such rights granted and no pretense is made upon the part of

the whites in the other tribes that they have any rights of property. This action upon the part of the contracting parties is a clear contemporaneous construction of the words, "legally members of the nation by adoption." It means those who are adopted by treaty stipulations between the United States and the Nation of Indians.

That the whites were purposely not included cannot be doubted when we inquire into the circumstances surrounding the making of the Treaty of 1866 (p. 152, 30 Ct. Cls.). Besides the Cherokees, representatives of the Creeks, Chocktaws, Chickasaws, Seminoles and other tribes were all gathered at Fort Smith, Arkansas, at the instance of the United States and all at the same time and for the same purpose. Practically similar conditions were proposed for all of these tribes, and the United States was represented by the same Commissioners empowered to make treaties with each tribe. No mention is made of the adopted or intermarried white men in any of the treaties except that with the Chocktaws and Chickasaws. The Chocktaws and Chickasaws, however, in addition to admitting friendly Indians upon an equality with native citizens, after providing for the occupation and selection of the lands by members of the tribe agreed. (Article XXVI.)

> "The right here given to the Chocktaws and Chickasaws respectively shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such."

And further provide for the rights of the intermarried whites in said nation as agreed. (Article XXXVIII.)

> "Every white person who, having married a Chocktaw or Chickasaw, resides in the Chocktaw or Chicasaw Nation, or who has been adopted by legislative authorities, is to be deemed a member of said nation,

> and shall be subject to the laws of the Chocktaw and Chickasaw Nation according to his domicile and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Chocktaw or Chickasaw."

These quotations show that the Indians provided for property rights in one paragraph of the treaty and for political rights in another, demonstrating beyond question that neither one of these embraces the other; further they show that in the Indian mind there was a distinction between an adopted citizen and an intermarried white person, otherwise it would have been useless to mention both of these classes in each of these paragraphs, and it further shows that in the estimation of the Indians and the Commissioners representing the United States the proper and legal mode of granting any share or portion of property of the Indian tribe to an alien was by treaty stipulation between the Indians and the Government of the United States.

Further provision is made in this treaty not only for those persons who were either adopted or intermarried into the tribe, but also for those who should thereafter come into the tribe by either process, showing that when the Indians intended to increase their citizenship by the admission of white men at a future day, they had sense enough to put it into the treaty. If the Cherokees had ever intended that their Constitution should apply to adopted whites thereafter coming into the Nation, they would have said so, and if they had intended that intermarried person should acquire property rights they would have said so, for no one will pretend that the Cherokees were a less intelligent people than the Chocktaws or Chickasaws. The fact is that the Cherokees constitute the most intelligent of all civilized tribes.

> "A charter intended to convey political power only would never contain the words expressly granting the land, the soil and the waters." *Johnson* vs. *McIntosh*, 8 Wheat., p. 543.

The converse of this proposition is equally true that an Act of the National Council of the Cherokees would have included a grant of land and share in the funds if the Cherokees had intended such to be the case.

Different Classes of Citizens.

It is not at all unusual to find a distinction between the rights and privileges of different classes of citizens of the same State or nation. This is recognized by the Cherokees by the difference between their intermarriage law for the whites and that for the Indians of other tribes hereinbefore set out. This is emphasized in the intermarriage law for the whites by the provision that a white man intermarrying with an Indian by blood acquires certain rights as a citizen, but there is no provision that if he marries a Cherokee citizen, not of Indian blood, that he shall acquire any rights or be regarded as a citizen at all, and further by the provision that if once having married an Indian by blood, he marries the second time a citizen not by blood, he loses all of his rights as a citizen.

The distinction between citizens as such and citizens with property rights has also been recognized by the Congress of the United States in enacments relating to other Indians than the five civilized tribes. By the Act approved August 9, 1888, 25 Stats., p. 392, and 1st Supp., p. 608, it is provided that a white man marrying an Indian woman (except of the five civilized tribes) shall not acquire any property rights in the tribal property, privilege or interest, and an

Indian woman marrying a citizen of the United States becomes thereby a citizen of the United States with all the rights, privileges and immunities of such citizen, without losing her tribal property or any interest therein; showing clearly a distinction by Congress between citizenship and property rights in Indians.

By the Act of Congress of May 2, 1890, (26th Stats., p. 96), the property of an adopted citizen of any of the five civilized tribes, in the form of improvements upon real estate in the Indian Territory, in excess of one hundred and sixty acres, is made subject to the payment of a judgment of the court, and no such provision is made as against members of the tribe, who are not adopted citizens.

By the Act of June 7, 1897, (30th Stats., p. 90), it is provided that the children born of the marriage between a white man and an Indian woman by blood, *and not by adoption*, shall have the same rights to the property of the tribe to which the mother belongs by blood as any other member of the tribe, making the clear distinction between children of a citizen by blood and one by adoption.

In discussing the difference between the rights of different classes of citizens, the Court of Claims in the case of *Whitmire* vs. *The Cherokee Nation*, (30th Court of Claims, p. 152), says "here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country—white men who became citizens by intermarriage;" further the Court, after quoting from the Cherokee law, relating to the intermarriage of whites, says, "the idea, therefore, existed both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the Constitution termed the common property or lands of the Cherokee Nation."

"Rights and immunities" often mean only political rights. Journeycake case, 155 U. S., 212.

In Stephens vs. Cherokee Nation, 174 U. S., 445, 488, Chief Justice Fuller declared. "It may be remarked that the legislation seems to recognize, and especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which a right to a share in the latter would not necessarily follow from the concession of the former." Commenting on this, the Court of Claims says in its opinion in the pending case, "it cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs, or to confer upon the white citizens property which they were not legally entitled to have. The term citizens in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of the lands." (R. 41.)

The fact that the native Cherokees are citizens of the Cherokee Nation and that the whites intermarrying with Cherokees are also called citizens of the nation, by no means indicates that the whites so intermarrying are to enjoy all the rights, privileges and immunities that belong to the native Cherokee citizen.

"Words and phrases are used with different signification and with different shades of meaning in different connections. They are not to be interpreted, invariably, as expressing precisely the same idea in all cases." Beckwith vs. United States (16 Ct. of Cls., 250-262.)

"When that (the meaning of the Statute) can be satisfactorily gathered from the whole language of an Act or Section, taken in connection with the manifest object

designed to be accomplished, it is not necessary to give to every word its exact signification as an independent word, when it would be inconsistent with other words and other parts of the same Statute. "Farden vs. United States, (13 Ct. of Cls. 347-352). Affirmed on appeal, (99 U. S. p. 10).

"The language of a Statute is to be interpreted with reference not only to the general subject to which it relates, but also to the particular matter which the legislature appears to have had in hand, and the object which it seems to have aimed to accomplish, as manifested by other parts of the Act; and words are not always to be restricted to their signification as independent words, but may be qualified by their surroundings and connection." (McLure vs. U. S., 19 Ct. Cls., p. 24.)

In some of the States of the Union women who are citizens are voters, and in other States they are not. In some States educational qualifications and in others property qualifications are required for voters, but this variety in the privilege of citizenship does not alter the fact that all of these people are alike citizens of the commonwealth.

Previous Action of Whites.

At no time in the whole history of the Cherokee Nation has any demand been made by the intermarried whites to participate in the distribution of any money paid out to the Cherokee citizens, including of late years, the Shawnees, Delawares and freedmen, excepting, of course, the "bread money" distributed to all persons, without distinction, to prevent starvation and death. Intermarried whites have drawn money for their wives and children from the public funds and made no complaint that none was paid

to them. (R., p. 57.) They have acquiesced in the intermarriage law, which placed them upon a wholly different footing from that of native Cherokees or intermarried Indians of other tribes. They have seen the Shawnees, Delawares and freedmen apply to the Congress of the United States and secure the enactment of laws permitting them to test their several rights to share in the funds of the Cherokee Nation theretofore distributed, and succeed therein, without making any attempt to do the same themselves; they have brought no action for their proportionate share of any fund, although by the laws of the Cherokee Nation they could have instituted suit at any time against the Nation for the recovery of any money due them; (R. p. 57), and not until the final distribution by the Cherokees of the patrimony of their fathers and the inheritance of their children, have the intermarried whites set up any pretense whatever that they were citizens of the class entitled to share in the lands and funds of the Cherokee people.

The Shawnees, Delawares and freedmen applied to Congress in 1888 and secured an appropriation of $75,000, to be paid to them in lieu of the funds distributed by the Cherokee Nation to Cherokees alone. (25 Stat., p. 608.) The intermarried whites were not mentioned in this Act, and the record gives no evidence of an effort upon their part to be included. This Act of Congress followed the veto message of Bushyhead, Principal Chief, dated May, 18, 1883, makes specific reference to that message and shows the purpose of the Act was to rectify the wrong complained of. This Act therefore is a legislative recognition by the United States of the difference between the rights of the Delawares, Shawnees and freedmen and those of the intermarried whites in the Cherokee Nation, and this construction has been followed by the United States in subsequent

Acts of Congress. The Act of Congress under which the cases of Journeycake, Blackfeather and Whitmire were instituted in the Court of Claims was passed and these cases determined in favor of the claimants, and no effort on the part of the whites to be included is shown in the record.

We confidently assert that if these astute, intelligent and ambitious white men, living in the Cherokee Nation, had any basis whatever for a claim of a part of the lands and funds of the Cherokee Nation, they would have asserted it long before this, and their long inaction and acquiescence in the construction of the Cherokee laws, which excluded them from property rights, is binding upon all parties concerned.

"To get at the purpose and intention of the parties, we have a right to consider the construction the parties to the instrument, and who were affected by it, have given it, and what have been their actions under it" U. S. vs. Payne (2d McCreary, p. 295; 8 Fed., p. 888.)

Previous Decisions of the Court.

In the case of Journeycake (155 U. S., pp. 196, 208), this Court holds that the grant of *equal* rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship. That doctrine was applicable to the Delaware Indians, who obtained all the rights of native Cherokees under treaty with the United States, and by agreement with the Cherokees, but it has no application to the intermarried whites who never were by any treaty, agreement, Act of Congress or of the Cherokee Council, granted equal rights, except two who paid $500 into the Cherokee Treasury during the two years that privilege existed.

Before the Court of Claims it was argued by Counsel for the intermarried whites that the question now in controversy has been already determined. For this purpose, he quoted from the cases of Journeycake and Whitmire and undertook to show that the white men were included in these decisions. He did not point out clearly whether the Court had converted the whites into freedmen, Shawnees or Delawares. They must be turned into one or the other of these, because the rights of each of these classes of citizens depend upon the peculiar facts connected with each class, and the Court laid down no general principle under which other claimants relying upon an entirely separate state of facts would nevertheless be included. What the Court really decided in the Journeycake case it sets forth in its decree (28 Ct. of Cls., p. 319), to wit: that the Delaware Indians were entitled to participate in the lands and funds "in the same manner and to the same extent as Cherokee citizens of *Cherokee blood*," and the point actually determined by the Court in the Whitmire case set forth in the decree (30 Ct. of Cls., p. 193), is that the freedmen are to share in the common property "in the same manner and to the same extent as Cherokee citizens of *Cherokee blood* or parentage." To the same effect is the case of Blackfeather (155 U. S., p. 220).

Evidently in the mind of the Court, the "Cherokee citizen of Cherokee blood" constituted a class with a different measure of rights and privileges from the simple Cherokee citizen, and the Cherokee citizen of Cherokee blood was made the standard by which to determine the property rights of the Delawares, Shawnees and freedmen.

Counsel also quoted before the Court of Claims from the decision of the Supreme Court in the Journeycake case to the effect that if two propositions are given, to wit: (1) that the lands are to be common property of the Cherokee

Nation, and (2) that the registered Delawares have become incorporated into the Cherokee Nation and are members and citizens thereof, it follows necessarily that the Delawares are entitled to share in these lands. That does not fit this case, for as we have shown in this Brief, these lands have ceased to be common property of the Cherokee Nation by action of the National Council in accordance with the Constitution of the Cherokee Nation, and are now divisible amongst the Cherokees; and second, the intermarried whites are not members and citizens thereof, and never have been, in the sense in which the word is used by the Supreme Court.

When we remember that Courts have always held that their decisions are intended to apply only to the case then before them, it cannot be supposed that the Court in the previous cases of the Shawnees, Delawares and freedmen have tied their hands as to the questions involved in the case of the intermarried white men, so that they are not in a position to decide the case of the intermarried whites upon the facts which are now here presented for the first time.

In *Stephens* vs. *Cherokee Nation*, 174 U. S., 445, the Supreme Court holds that Congress has the full power to legislate with reference to the Indian tribes, provided it does not infringe a provision of the Constitution.

It is precisely on account of an infringement of the Constitution prohibiting the taking of private property without due process of law that any legislation of Congress which attempts to engraft the white men into the Cherokee Nation is void and of none effect. It is alleged in the petition and admitted by the answer of the intermarried whites, that, if the white men are enrolled for participation in the Cherokee property it will to that extent diminish the share of each of the Cherokees by

blood and thus take from them property by legislative act, which is not due process of law. If such action by Congress has really been attempted, which we deny, it cannot be said that the Cherokees have agreed to it, for the record discloses the fact that when the vote was taken on the Act of Congress the intermarried whites cast votes in favor of the Act of Congress, largely in excess of the majority given at the polls, and that white men who married into the tribe since 1895 voted at the election in favor of the Act of Congress, although it is conceded on all sides that they had no interest present or prospective in the Cherokee property.

The legislation of Congress relating to the Cherokees can all be easily understood if it is remembered that when speaking of citizens Congress intended to refer to those citizens who had property rights as distinguished from those who had simply political rights. If this view be adopted, no constitutional questions will be raised, and the action of Congress and that of the Cherokee National Council and the decisions of the courts will all be found to be harmonious.

In the case of *Stephens* vs. *The Cherokee Nation* above cited, it was held that the petitioners could not raise certain questions relating to the property, because their right to participate had not been established. In the pending case no such questions can be made, for the pleadings admit the right of the Cherokees by blood to share in the property, and in addition to that the Cherokee Nation as intervenor, of course, has full power to raise any questions connected with the distribution of the property of the Cherokees.

It is most unreasonable to suppose that the United States ever intended that three or four thousand white men should become members of an Indian tribe located upon

land specifically set apart for their use and benefit, and that these white men should thereby become a portion of a dependent domestic nation, located within the boundaries of the United States, over whom the United States would not exercise the same rights and powers that it exercised over all other American citizens, and that these white men by reason of their membership in the Indian tribe should place the United States in the attitude of a guardian for them, holding their funds in the treasury and with whom the United States would constantly deal as if these white men in fact constituted an inferior race.

Cherokee Title to Lands.

The title of the Cherokees to their lands was settled by the Treaty of 1846, which in Article 1, declares: "that the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit," and the United States agrees to secure and guarantee to them and their *heirs* and successors these lands. Article 4 of the same treaty declares, these lands "shall be and remain the common property of the whole Cherokee people." The Cherokee Constitution, Article 1, Section 2, provides: "the lands of the Cherokee Nation shall remain common property." An amendment to the Constitution of November 26, 1866, Article 1, Section 2, declares the lands of the Cherokee Nation "shall *remain* common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20 of the Treaty of the 19th of July, 1866, between the United States and the Cherokee Nation." The National Council has made this request for the survey and allotment of the Cherokee lands (R. p. 55), and under Article 20 of said Treaty of 1866, these lands are to

be allotted *amongst the Cherokees.* This was a solemn compact between the United States and the Cherokee people, made with all the formalities of a treaty, and we submit that the government has no power or authority to allot these lands to anyone except to the Cherokees and those upon whom they have conferred by treaty stipulations, "all the rights of native Cherokees." At the time the intermarried whites claim to have secured their rights, the title to this land was in the Cherokee people as their common property.

In the case of Journeycake vs. the Cherokees, (28 Ct. of Cls., p. 281), the only question before the Court was the right of the Delawares under the Treaty of 1867, to share in funds arising from the leasing of Cherokee lands west of 96 degrees of longitude. The question of title to the lands, whether held by the nation or the members of the community was not necessarily involved in the case; and the decree rendered by the Court, which, after all, covers the only points decided in the case, does not mention this question. And the Treaty of 1846, above cited, which really declares the character of the Cherokee title, was not even mentioned in the argument and was only incidentally referred to once in the Opinion.

The patent issued in 1838, for the Cherokee lands was in favor of the Cherokee Nation, and as we understand the cases heretofore decided, the Courts in discussing the title of the Cherokees has always referred to this patent as the muniment of their title. On February 28, 1840, John Ross and other Cherokees having full authority from the Cherokee people, submitting their memorial to the President of the United States, made four specific requests, the second of which is as follows: "Establishing a satisfactory definition of the tenure under which they are to hold their lands in the West." On September 20, 1841,

the President of the United States replying to this memorial promised to negotiate with the Cherokees a new treaty, in which not justice merely should be done them, but a liberal and generous course adopted toward them. (This correspondence appears in H. R. No. 288, 27th Congress, 3d Session, p. 49, and in H. R. Doc. No. 316, 25th Congress, 2d Session). This correspondence was followed by the Treaty of 1846, which provided for the granting of another patent for the Cherokee lands, to be issued by the United States, conveying title, of course, to the Cherokees, in accordance with the terms of said treaty, which declared that "the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit." Manifestly, the purpose was to change the character of the tenure, otherwise there would have been no benefit from inserting this provision in the treaty providing for the issuance of a new patent, and at the same time describing in the treaty the character of tenure by which the land was to be held. We submit therefore, that the Treaty of 1846, is the present basis of the Cherokee title, and that under this treaty the Cherokee Nation is not the owner and holder of the Cherokee lands, but that the lands are secured to the whole Cherokee people without reference to their body politic.

Discussing the character of the tenure of the Cherokee lands, the Court of Claims in a recent case says:

> "But in 1835, the lands of the Cherokees east of the Mississippi, and in 1846, the lands of the Cherokees in the Indian Territory, were neither public or private lands in the ordinary sense of those terms. The term 'communal,' it is believed, is not to be found in Treaties or Statutes or public documents relating to the Indians prior to the date of the case of the *Western Cherokees.* (27 Ct. of Cls. p. 1). But

> the officers of the government, * * * have always treated Indian lands as communal, though they did not use the term and had very dim perceptions as to the nature of the estate. Whenever the government has paid for a section of the Indian land *per capita* to every member of an Indian community, share and share alike, it was because the Indians knew that their lands were communal property and that they, as communal owners, were entitled to the purchase money."

In the same case, the Court further holds that:

> "While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners, they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate and they have not assumed to hold the title or to be entitled to the puchase money. * * * In the present case, the Cherokee Nation takes the place so far as communal ownership is involved as the chiefs and head men of the uncivilized tribes." Cherokee Nation vs. United States, (40 Ct. of Cls. pp. 325-327).

From this, the last authoritative decision upon the question of the tenure of the Cherokees, it is clear that the Cherokee title to their lands is not in the nation as a body politic. The nation simply holds it in trust for the benefit of all the communal owners. It must be manifest that the nation as trustee has no authority to admit to the enjoyment of the trust property, several thousand white men who have paid nothing for a right or share in the property held in trust.

Whatever may be, however, the Opinion of the Court on this point, one thing is manifest and that is, that the title

was settled by the treaty and by the Constitution of the Cherokee people and we insist that the Cherokee National Council had no authority or control of any kind over the lands or funds of the Cherokee people. The authority of the Cherokee Council was limited solely to the government and control of the citizens, and with that their power ended. Under the Constitution, by Article 3, Section 14, its power was limited to the enactment of laws deemed necessary and proper for the good of the nation, which shall not be contrary to the Constitution. It would have been contrary to the Constitution for the National Council to pass any law relating to the property which the Constitution declared should remain the common property of the Cherokees.

An Act of the Cherokee Council undertaking to dispose in any way of any part of the Cherokee National funds would have found no warrant in the Constitution and would have been utterly null and void. The same thing is true in an equal degree as to the lands of the Cherokees. In fact whatever the Cherokee Council may have done was of no force in view of the Acts of Congress and the decisions of the United States Courts. Section 2116 Revised Statutes declares:

> "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Section 2118:

> "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of $1,000. The President may moreover

take such measure or employ such military force as he may judge necessary to remove any such person from the lands."

By Art. 5, Treaty of 1835, which guarantees the Cherokees the right of self government their power to legislate is specifically limited by the Constitution and laws of the United States.

"The Indian title could not be conveyed by the Indians to anyone but the United States without the consent of the United States." Jones vs. Meeham, 175th U. S., p. 8, and the cases there cited.

"Indians being wards of the nation cannot suspend that relation without the consent of the government." Lowe vs. Kickapoos, 37 Ct. Cls., 413.

The Indian law has always declared that

"No man could be a son of the tribe unless he was a son of the daughter of the tribe." New York Indians vs. U. S., 40 Ct. Cls., 454.

Married out Whites.

A considerable number of persons known as "The married out and abandonment whites" (R. p. 49), also claim that they are entitled to be enrolled for the purpose of receiving a share of the lands and funds of the Cherokee Nation, notwithstanding that they admit that by reason of their own actions, they have under Cherokee law long since ceased to be citizens of the Cherokee Nation. The claim of this class of persons is so completely settled by the Opinion of the Court of Claims (R. 41), that it seems useless to add anything to what that Court has said.

It may be remarked, however, that as an original proposition, so far as either law or justice is concerned, the other class of claimants have no more basis for their demand for a share of the Cherokee property, than have these persons who have openly and notoriously forfeited whatever pretense of claim they ever had.

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